Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-201

NEIL KAMERLING, RICHARD CANTELLO,
EDWARD MORAN, and JOSEPH J. ANASTASIO,

Petitioners,

—against—

JOHN T. O'HAGAN, Fire Commissioner,
City of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners Neil Kamerling, Richard Cantello, Edward Moran, and Joseph Anastasio respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit rendered March 18, 1975.

Citations to Opinions Below

The opinion of the Court of Appeals is reported at 512 F.2d 443, and appears in the Appendix. The opinion of the District Court for the Eastern District of New York is not reported and appears in the Appendix.

Jurisdiction

The judgment of the Court of Appeals was made on March 18, 1975. On June 10, 1975, Hon. Thurgood Marshall granted the application of petitioners to extend the time to file this petition and extended the time until August 15, 1975. This Court's jurisdiction is invoked under 28 USC §1254 (1).

Question Presented

Can a municipal fire department constitutionally regulate the length of hair and the wearing of beards and mustaches by firemen upon a mere representation that the regulation is related to a purpose of health and safety?

Regulations Involved

The regulation at issue here appears in the margin of the decision of the Court of Appeals, App. p. 2A-3A.

Statement of the Case

The present action was brought in the District Court for the Eastern District of New York (Hon. Mark A. Constantino) by active duty firefighters in the New York City Fire Department, against the defendant John T. O'Hagan, Commissioner of the New York City Fire Department. The case is a civil rights action under 42 U.S.C.§1938 for declaratory and injunctive relief against the operation of hair and beard regulations which were issued by Commissioner O'Hagan in 1974.

Plaintiffs allege that the hair and beard regulations constitute a violation of their First and Fourteenth Amendment rights.

On July 17, 1974 temporary orders restraining the enforcement of the regulations against the plaintiffs were entered pending a hearing of the complaint. On July 24, 1974 the plaintiff's complaint was dismissed following a hearing and the temporary restraining orders were vacated by the District Court.

In its decisions the District Court pronounced the regulations to be "reasonably related" to the legitimate state interest (App. p. 8A) in safety for firemen, upon a finding that actions violating the regulations "may" increase dangers that firemen face.

The plaintiffs appealed to the Court of Appeals for the Second Circuit. In a per curiam opinion by Judges Anderson, Mulligan and Van Graafeiland that Court affirmed. The Second Circuit rejected the contention of the plaintiff firemen that the defendant had the burden of establishing a compelling state interest (App. p. 4A) and accepted the reasonable relationship test applied by the District Court. The plaintiff firemen Kamerling, Cantello, Moran and Anastasio petition for a writ of certiorari to review that decision.

This is a case in which the standard of proof was crucial, because the defendant produced an assortment of evidence which could be adequately evaluated only under the most careful scrutiny.

Fortunately, the regulation at issue here is of recent vintage, so that evidence was available of the experience of large numbers of firemen who wore beards or long hair before 1974.

The two major areas of factual controversy relate to the alleged "inflammability" of hair and the ability of firefighters with long hair or beards to obtain a seal while wearing their face masks.*

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* The evidence as to the other health justifications advanced by the respondent was even more general and condusory than that described for face masks and inflammability.

The District Court purported to take judicial notice of the truth of the respondent's contention that hair burns (141a, 257a*). In fact the Chief of Staff of the Fire Department knew of no scientific test establishing the inflammability of hair, and of no case when a fireman's hair had burned (T.140a). Although the respondent Fire Commissioner claimed that long hair burns, he was unable to produce reports proving such inflammability (112a). In fact, the proof showed that hair singes and melts in a fire (140a, 154a-155a, 249a, 258a-259a) and there was no scientific proof that hair would flare up in any fire which was not so hot as to produce the same injury to the skin of an unbearded man. The Chief Medical Officer of the Fire Department testified that in twenty-two years, he did not know of one case of a beard burning (217a-218a). The District Judge found that no expert testimony established that long hair had ever caused any injury (259a-260a).

As against the ipse dixit of the trial court and some of the defense witnesses, there was concrete evidence that hair has no effect on safety. Fireman Collins testified that he was trapped in an engulfing fire during which he suffered

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* References to the Appendix in the Court below are in the form "_____a)".

burns only to those portions of his uncloth-
ed skin which were not covered by hair
(202a-206a). Petitioner Neil Kamerling,
a fireman, testified that, when his hair
was approximately shoulder length, a burn-
ing ceiling fell on him and his hair sin-
ged but did not burn (151a, 154a-155a,
157a-158a). Testimony of such singeing
in the absence of burning came also from
petitioner Edward Moran (179a-180a) and
defense witness Birmingham (245a, 249a).
It is hardly necessary to add that it was
not likely that those who actually did
the firefighting would advance
evidence which would endanger their own
safety.

The pattern of testimony with res-
pect to the seal of the gas masks was sim-
ilar: conclusory testimony for the res-
pondent, contrasted with concrete evidence
to the contrary.

In its opinion, the Court of Appeals
relied on the testimony of Fire Commission-
er O'Hagan in his capacity as a member of
the User Design Committee of the National
Aeronautics and Space Administration (App.
p. 5A). While NASA had tested face masks,
it had never tested the "Wilson 6000" face
masks used by the New York City Fire Depart-
ment (108a). Similarly, reports submitted
by the respondent showing a less than per-
fect seal for various face masks did not
include the face mask used by the respon-
dent (54a-1 through 54a-4). Commissioner
O'Hagan disclaimed the validity of tests

conducted by his own office, with the masks
actually used in New York City (108a-109a,
141a-142a). Those tests showed that beard-
ed firemen passed the teargas test without
leakage into the mask. Petitioner fire-
man Kamerling testified that he had passed
such a test wearing a full beard (150a-
151a) as did the witness, fireman Ulmer
(191a-193a).

The evidence showed that the fire
department conducts frequent "multi-unit"
tests, during which firemen are tested
for the seal on their face masks. The
Chief of Staff called it the "best prac-
tical" test (256a). All the plaintiffs
were able to get a proper seal with long
hair or a beard or both as was fireman
Hamill (221a). Captain Mahnken, a unit
commander, had worn long hair and a beard
before the regulation at issue here was
promulgated. He found that it did not
interfere with any aspect of firefighting.
He had never had any trouble getting a
seal with a face mask and none of the men
under him had found that the beard inter-
fered with the seal (226a). So many of
the men under his command had hair and
beards which did not comply with the regu-
lation, that half of them had to go to
the barber when it went into effect (233a).

It was stipulated that other fire-
men witnesses, if called, would similarly
testify that they could obtain a proper
seal and that their hair did not burn
(189a).

One fireman witness, Birmingham, testified that he could not get a seal while wearing a beard, although he knew of other firemen who could (246a, 251a).

It ultimately developed that it may be impossible to obtain a proper seal because of the bone structure and musculature of the face (114a-115a, 241a, 136a) regardless of the presence or absence of long hair or a beard and it was conceded that the plaintiff-petitioners, at least, could get a satisfactory seal wearing a beard (167a). Even the witnesses for the respondent Fire Commissioner were not able to point to a single instance where injury had resulted from hair or a beard which would violate the present regulations.

There was evidence concerning the appropriateness of the regulations to the strict health and safety for which they were purportedly drawn. Hair is permitted by the regulations to grow down to the collar and earlobe, which is below the helmet band, even though it is claimed that hair below the helmet band may flare up. It was this which caused the District Court at one point to call the hair regulation "arbitrary" (263a). More important, even a tiny beard, such as could easily be contained within a facemask is not permitted, although sideburns trimmed to fit the facemask are permitted. Mustaches which would fit within a face mask are forbidden. Finally, the respondent Fire Commissioner testified that wide latitude is allowed

to local commanders in the enforcement of the regulations, showing that he recognised that the aims of safety could be adequately obtained outside the confines of the regulations (91a-92a).

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS AND CLARIFIES ISSUES SIMILAR TO THOSE IN A CASE ALREADY PENDING BEFORE THIS COURT

The courts below based their decision on Dwen v. Barry, 483 F.2d 1126 (2nd Cir. 1973) cert. granted No. 74-1269, May 27, 1975. That case concerns hair and beard regulations for policemen. Rejecting the argument that policemen should be governed by standards analagous to those of the military, the Second Circuit there established the standard applied in this case, that regulations of personal appearance "must be justified by a legitimate state interest reasonably related to the regulation" (App. p. 4A).

A decision in the present case will clarify some elements which may be left open by Dwen v. Barry. The plaintiff firemen are not accounted by the respondent to be "para-military", and no attempt is made to justify the regulation at issue upon that basis. On the other hand, the regulation is labelled "health and safety

standards", and respondent has sought to justify it upon the ground of its reasonable relationship to a legitimate state interest in health and safety. As the Chief of Staff of the Fire Department testified (260a) and the District Court held (App. p. 8A), it was not justified because of any proven or provable danger in the long hair or beard but because of a mere possibility of harm. While the regulation at issue here, and indeed any regulation, might pass muster under such a test, it is submitted that the regulation can not survive under the test applicable in cases relating to the abridgement of other fundamental rights, see e.g. United States v. O'Brien, 391 U.S. 367, 377 (1968) as cited in Breen v. Kahl, 419 F.2d 1034, 1036 (7th Cir. 1969):

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

The regulation at issue here was not proven to be narrowly drawn to obtain only the state interest by the narrowest practicable means.

If the hair and beard regulations were intended to prevent burns, then valid testing concerning the fact that hair increases the likelihood of such burns, was an indispensable element in proving that the state interest in safety is really advanced by the regulation. The mere feeling or argument of fire officials on the point was not sufficient. See Vulcan Soc. of New York Fire Department v. Civil Service Commn., 490 F.2d 387 (2nd Cir. 1973) (rejecting unvalidated civil service examinations for New York City firemen.)

The evidence itself implied various alternatives less drastic than the regulation at issue. For example, if one purpose was to assure that a proper seal was obtained with a face mask, then the regulation could have limited its prohibition to those who could not, by an objective test, obtain a seal while wearing a full beard, and require such persons to wear a beard which fit within the mask. There was no necessity to forbid full beards for those who could get a seal, or indeed to forbid any small beard which fit within the mask. Similarly, there was no need to regulate any mustache which fit within the mask.

A standard of proof requiring that the respondent actually prove that the regulation advances a compelling state interest, and does so by the narrowest means consistent with constitutional rights of the firemen, could not have been met by the

narrowest means consistent with constitutional rights of the firemen, could not have been met by the proof put forward in this case.

If the personal right recognized in Dwen v. Barry is to be effectively preserved, it is essential that a standard of proof be used which is strong enough to protect it. Such a standard of proof was not applied in this case, and a writ of certiorari should be granted to devise such a standard.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 562—September Term, 1974.

(Argued February 18, 1975 Decided March 18, 1975.)

Docket No. 74-2155

NEIL KAMERLING, RICHARD CANTELLO, EDWARD MORAN, JAMES J. SEABARKROB, and JOSEPH J. ANASTASIO,

Plaintiffs-Appellants,

—against—

JOHN T. O'HAGAN, Fire Commissioner, City of New York,

Defendant-Appellee.

Before:

ANDERSON, MULLIGAN and VAN GRAAFEILAND,

Circuit Judges.

Appeal from the denial of a preliminary injunction and the dismissal of the complaint by Hon. Mark A. Costantino, *Judge,* United States District Court for the Eastern District of New York, in a suit by New York City firemen seeking to overturn a fire department regulation which prohibited beards on, and set standards for the hair length of, New York City firefighters.

Affirmed.

LEONARD D. WEXLER, Smithtown, New York (Meyer & Wexler, Smithtown, New York, Richard T. Haefeli, of Counsel), *for Plaintiffs-Appellants.*

MICHAEL AMBROSIO, New York, New York (Adrian P. Burke, Corporation Counsel of the City of New York, L. Kevin Sheridan, of Counsel), *for Defendant-Appellee.*

PER CURIAM:

This action was commenced by an order to show cause seeking a preliminary injunction, and by a summons and complaint seeking a permanent injunction, against the Fire Commissioner of the City of New York. On July 1, 1974, the Commissioner had issued a regulation, PA/ID 6-74,[1]

1 The Regulation reads in part as follows:

SUBJECT: HEALTH AND SAFETY STANDARDS FOR HAIR AND BEARDS

1. STATEMENT OF POLICY

A) The grooming of individual members of this Department must be consistent with the conditions under which he is employed. Most of our work takes place in highly heated, toxic, poorly illuminated, abnormal and unsanitary conditions. Smoke inhalation, heat prostration, lacerations, burns and falls are common consequences of firefighting. Hair of excessive length on the head, and hair on the face of any length will increase the probabilities of the indispositions mentioned above. With the mask facepiece designs currently in use it has been reliably proven by NASA, the National Bureau of Standards and others that it is impossible to obtain a satisfactory seal on a bearded man.

B) It is evident also that flowing hair is more readily ignited and that hair, excessive to any degree, acts as an insulator, retaining body heat and raising body temperatures at a time when eliminating body heat through exposed skin surface is highly desirable.

C) The health of the individual fireman is also compromised when working in an unsanitary environment. Exposed hair is a

which banned beards and set standards for the length of firemen's hair, moustaches and sideburns. The plaintiff firemen who were in violation of the regulation challenge it as an unconstitutional invasion for their rights of free expression, due process and equal protection. The defen-

breeding place for germs. Lacerations on hair covered surfaces are subject to infection in direct proportion to the area and depth of the hair thereby complicating the injury and extending recuperation period.

D) Accordingly, safety standards for personal grooming and procedures for implementation are hereby established within the following guidelines. They shall apply to all members capable of performing fire duty.

2. STANDARDS

A) Head hair:

1. Head hair shall be of such length and style as desired but shall be within the following restrictions:
   a. Hair on top of the head shall not be excessive in length at any point.
   b. Hair, except for shingled or cropped areas, shall not protrude below any point along the full band line of the helmet.
   c. Hair at the back of the neck shall be tapered neatly and shall not extend below the shirt collar.

B) Facial hair:

1. Moustaches are permitted, but shall conform to the following:
   a. They must be closely trimmed.
   b. They must not extend beyond the corners of the mouth.
   c. They must not extend below any portion of the upper lip.
2. Beards or goatees are not permitted.
3. All members shall be otherwise freshly shaven when reporting for duty.

C) Sideburns:

1. Sideburns shall be kept neatly trimmed and close to the face to avoid any possibility of a defective mask facepiece seal.
   a. They shall not extend below the lower extremity of the ear.

dant Commissioner took the position that the regulation was necessary to insure the safety and security of the fire-fighting personnel of the Fire Department. After a two-day hearing, Hon. Mark A. Costantino, United States District Judge for the Eastern District of New York, issued a decision and judgment entered on July 30, 1974, denying the application for a preliminary injunction and dismissing the complaint. The only issue raised on appeal is that the trial court's conclusion that the defendant had established a genuine public need for the regulation was based upon erroneous findings of fact.

In *Dwen* v. *Barry*, 483 F.2d 1126, 1130 (2d Cir. 1973) this court stated that ". . . choice of personal appearance is an ingredient of an individual's personal liberty and . . . any restriction on that right must be justified by a legitimate state interest reasonably related to the regulation." This "reasonable relation" test is clearly applicable here; the suggestion in appellants' brief that the Commissioner had the burden of establishing a "compelling" state interest in order to justify the regulation is without support in precedent or logic. There was ample evidence to justify the conclusion of the court below that the regulation, which applied only to Department personnel actively engaged in fire fighting, was promulgated to insure the safety of firemen and that it was reasonably related to a legitimate state interest. As the court observed in a case upholding a similar regulation of the Philadelphia Fire Department, *Michini* v. *Rizzo*, 379 F. Supp. 837, 852 (E.D. Pa. 1974): "The officials in charge of the Department have a right—and a duty—to seek to achieve *maximum* safety" (emphasis in original). Although the named plaintiffs testified on their own behalf to the effect that they had never been hampered or endangered by long hair or beards, other evidence before the court was contrary. There was the testimony of the

Commissioner and the Fire Department Chief of Staff that fire-fighters have had their hair burned below the rim of the helmet; see *Michini* v. *Rizzo, supra*, 379 F. Supp. at 846-47;[2] *Olszewski* v. *Council of Hempstead Fire Dep't*, 70 Misc. 2d 603, 334 N.Y.S. 2d 504, 508 (Sup. Ct., Nassau Cty, 1972), modified procedurally, 41 App. Div. 2d 968, 344 N.Y.S. 2d 992 (2d Dep't 1973). There was medical evidence that facial hair is flammable as well as infectious and that injuries to full-bearded faces create greater than normal obstacles to treatment.

Despite the contrary testimony of plaintiffs there was live testimony as well as scientific data submitted to the court which established that beard growth substantially increases the inward leakage rate of face masks. The Commissioner, who is a member of the User Design Committee of the National Aeronautics and Space Administration, testified that a cleanly shaved face is required in order to achieve a good seal on the face mask of the Scott Airpack, the respirator used by the New York Fire Department. See *Olszewski* v. *Council of Hempstead Fire Dep't, supra*, 334 N.Y.S. 2d at 506-08.

In view of the unquestioned interest of the City of New York in the health and safety of its fire-fighters, as well as that of the citizens they serve, we conclude that the regulation in question is reasonably related to that interest, that the findings of fact below were not

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2 In the *Michini* case the named plaintiff, while on the stand, in order to illustrate his assertion that hair does not burn, struck a match and held it briefly to his hair, which proceeded to burn brightly for several seconds causing five fire officers in the courtroom to jump to their feet and shout warnings. Singed but undaunted, the plaintiff blamed the blaze on his hair spray. The court was unimpressed: "Viewing the testimony on the subject as a whole, we are persuaded that hair exposed at the back of the neck constitutes a hazard on the firegrounds." 379 F. Supp. at 847 (footnote omitted).

erroneous, and that therefore the order appealed from must be affirmed.[3]

Affirmed.

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3 We note in passing the other courts not cited heretofore that have upheld similar regulations, e.g., *Yarbrough* v. *City of Jacksonville*, 363 F. Supp. 1176 (M.D. Fla. 1973); *Manco* v. *Town of Irvington*, 126 N.J. Super. 148, 313 A.2d 219 (App. Div. 1973), aff'd, 64 N.J. 142, 313 A.2d 204 (1974). But cf. *Lindquist* v. *City of Coral Gables*, 323 F. Supp. 1161 (S.D. Fla. 1971) (length-of-sideburns regulation struck down. However, in *Lindquist* the parties stipulated *(inter alia)* that plaintiff's sideburns did not present a health hazard or physical danger, and that the regulation was founded primarily on a desire for "uniformity, neatness and style," rather than on a desire for safety).

DECISION AND JUDGMENT OF
THE HON. MARK A. CONSTANTINO
DISMISSING COMPLAINT AND
DENYING INJUNCTION

Plaintiffs here seek to enjoin the enforcement of the newly promulgated hair regulation of the New York City Fire Department alleging that it infringes upon the constitutional rights of the firemen. They maintain that the length of hair and the existence of facial hair on firemen should be of no concern to the Fire Department and that regulation of grooming standards is a violation of firemens' First and Fourteenth Amendment rights. After a hearing on plaintiffs' application for a preliminary injunction, the court makes the following findings of fact and conclusions of law.

The test to be applied in this area has recently been enunciated by the Second Circuit in Dwen v. Barry, 483 F.2d 1126. There the court held that any restriction on an individual's choice of personal appearance must be justified by a legitimate state interest reasonably related to the regulation.

Because of the particular dangers that firemen are called upon to face, including flames, burning debris, noxious and superheated gases, regulations to protect the safety of firemen are, of course, required. If the restrictions are reasonable, they can be justified by the legitimate state interest in protecting the safety of firemen.

The evidence before the court, including a demonstration of several men putting on the gas mask with different amounts of facial hair and hair lengths, while conflicting to some degree, supports defendant's point of view that hair longer than the regulation permits and mustaches and beards may increase the dangers that firemen face. Hair that extends below the helmet may catch fire. Facial hair extending to the outer rim of the gas mask may interfere with the seal required for effective use of the gas masks that firemen in New York use. The greater the leakage into the mask the greater the risk that the firemen will be disabled. In addition to endangering his own life, an injured fireman can endanger the safety of other firemen and, indeed, the effectiveness of the Fire Department in extinguising any particular fire with a minimum of loss. Any reasonable measure that reduces the risks to firemen is therefore in the public interest and is constitutionally permissible.

Since it has been shown to the satisfaction of the court that hair longer than the regulation allows, or facial hair that the regulation prohibits, appears to be a safety hazard, the court holds that the regulation is a valid exercise of state power and is not an unreasonable interference with the firemens' constitutional rights. Any general prohibitions that the regulation contain are a natural outgrowth of the practical aspects of enforcing the regulation and are also reasonable under the circumstances.

It is significant that the regulation here at issue applies only to active fire fighters, making clear that grooming for disciplinary or other reasons is not being regulated and safety is the primary motivation for the regulation.

Accordingly, plaintiffs' application for a preliminary injunction is denied and the complaint is dismissed. Defendant is ordered, however, to allow five days for compliance with its regulation before any disciplinary procedures are instituted.

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-against-

JOHN T. O'HAGAN, Fire Commissioner, City of New York,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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SUPREME COURT OF THE UNITED STATES

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NEIL KAMERLING, RICHARD CANTELLO, EDWARD MORAN, JAMES J. SEABARKROB, AND JOSEPH J. ANASTASIO,

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

PRELIMINARY STATEMENT

Plaintiffs' civil rights complaint which challenged a regulation of the New York City Fire Department banning beards and setting limits on the length of firemen's hair, moustaches and sideburns was dismissed after trial by the District Court for the Eastern District of New York. The Court of Appeals for the Second Circuit affirmed.

QUESTION PRESENTED

Did the Fire Commissioner 's decision to prohibit firemen from wearing beards and to regulate the length of hair, moustaches and sideburns, as a safety measure, constitute an infringement of petitioners' constitutional rights?

OPINIONS BELOW

The opinions of both the Court of Appeals and the District Court are reprinted in full in the appendix to the petition. The Court of Appeals began by holding that the constitutional test to be used to measure the validity of the instant regulation was the same test as applied in Dwen v. Barry, 483 F. 2d 1126 (2nd Cir., 1973), cert. granted No. 74-1269, May 27, 1975, namely, whether the restriction on personal liberty was justified by a legitimate state interest reasonably related to the regulation. The court rejected as "without support in logic or precedent" the petitioners' suggestion that the Fire Commissioner had to establish a "compelling" state interest to justify the regulation. The court went on to find that the Fire Commissioner had both the right and the duty to seek to achieve maximum safety and that safety was a legitimate state interest. Finally, the court affirmed the finding of the District Court that the evidence offered by the Fire Commissioner established that the regulation, which applies only to personnel actively engaged in fire fighting, was reasonably related to the state's legitimate interest in health and safety.

ARGUMENT

THE TEST APPLIED BY THE COURTS BELOW TO DETERMINE THE CONSTITUTIONAL VALIDITY OF THE REGULATION CHALLENGED HEREIN WAS ENTIRELY APPROPRIATE

The petitioners contend that their right to choose their personal appearance can not be regulated by the state unless it can show a "compelling state interest in doing so. We submit that the Court of Appeals correctly rejected the petitioners' argument as without either logic or precedent.

The compelling state interest test has been employed by this Court to test regulations which restrict First Amendment freedoms. See, Thomas v. Collins, 323 U.S. 516 (1945) (free speech), and Sherbert v. Verner, 374 U.S. 398 (1963) (freedom of religion). This same test was applied in Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), to measure the validity of a school regu-

lation which prohibited the wearing of armbands in school. The Court recognized that armbands are a method of expressing views and are a type of symbolic act closely akin to pure speech which is entitled to comprehensive protection under the First Amendment. The court in applying the compelling interest test to the regulation held it to be invalid but stated at page 508:

> "The problem posed by the present case does not relate to the regulation of the length of skirts or the type of clothing, to hair style, or deportment... It involves direct, primary First Amendment rights akin to 'pure speech'." (emphasis added)

Although this Court clearly indicated in Tinker that it did not view the issue of hair style as one of major significance, petitioners have, nevertheless, attempted to transmute their tonsorial predilections into a fundamental constitutional right. Clearly, there is no precedent for this. Some courts which have considered the constitutionality of hair style regu-

lations have found no constitutionally protected right to be involved. Others, like the Court of Appeals for the Second Circuit, have viewed the choice of hairstyle as part of the liberty protected by the 14th Amendment. Dwen v. Barry, 483 F 2d 1126 (2d Cir., 1973), cert. granted No. 74-1269, May 27, 1975.

Only one court of which we are aware, the United States Court of Appeals for the Seventh Circuit, has held, in Breen v. Kahl, 419 F. 2d 1034 (1969), that the right to select one's hair style is "fundamental" and that the state must bear a "substantial burden of justification" to restrict that right. The court, however, was unable to clearly identify the source of this "fundamental" right, and merely attributed it to the "penumbras" of either the First or Ninth Amendment. Petitioners' reliance on Breen, however, is misplaced. In Miller v. School District Number 767, 495 F. 2d 658 (7th Circ.,

1974), the court questioned the viability of its decision in Breen and concluded at page 664:

> "... if one's interest in appearing as he chooses is a constitutionally protected interest in liberty, it is of a much lesser magnitude than a 'fixed star in our constitutional firmament'."

Whatever may be the remaining precedential value of Breen, these petitioners failed to even suggest at trial that they viewed their hairstyles as a form of symbolic speech. If hair style is entitled to the special protection of the compelling state interest test, which has generally been reserved by this Court for First Amendment freedoms, it must be because hair style is a form of expression protected by that amendment. Although four of the five petitioners testified at the trial, not one of them even suggested that his choice of hairstyle was more than a question of taste.

Respondent has never suggested that

petitioners' choice of hair style is unprotected by the constitution. Since the decision in Dwen v. Barry the choice of one's own hair style has been recognized in the Second Circuit as part of that liberty protected by the 14th Amendment.

> "[But] [l]iberty under the Constitution is... necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process." West Coast Hotel Co. v. Parrish, 300 U.S. 389, at 392 (1937).

The decisions in this case of both the District Court for the Eastern District of New York and the Court of Appeals clearly show that the regulation at issue was designed to enhance the safety of firemen and that safety is a legitimate community interest.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

September 19, 1975

Respectfully submitted,

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